No. 14,492

IN THE

United States Court of Appeals

For the Ninth Circuit

RAYMOND J. KASPER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Northern District of California.

BRIEF FOR THE UNITED STATES.

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STATEMENT OF THE CASE.

Appellant herein was convicted (R. Vol. 1, p. 62)* on four counts of an indictment (Vol. 1, pp. 1-5) charging him with attempting to defeat and evade income taxes by filing false and fraudulent returns for the years 1947 and 1948. It was charged that by the

*The record herein is typewritten and in nine volumes. The numbering is not consecutive. Volume 1 contains pages 1 to 73; Volumes 2 to 8 contain pages 1 to 938A; Volume 9 (Instructions to Jury) contains pages 1 to 32. References herein to the record, *without* a volume number will refer to pages in Volumes 2 to 8, inclusive. If references are intended to Volumes 1 or 9 the volume number will be cited.

false returns appellant understated the income of himself and his wife for the two years by a total sum of $42,509.29 and evaded taxes in the total sum of $15,041.14.

Appellant is a doctor of medicine. He began his practice in Wahoo, Nebraska, a town of some 3,000 people, in 1934 (R. 749) and practiced there until 1942. (Pl. Ex. 53, p. 2.) He left Nebraska in 1942 to work for a few months at a railroad hospital in Missouri at a salary of about $175.00 per month. (Pl. Ex. 53, pp. 2-3.)

Appellant came to Fresno, California in October of 1942 and went to work for another doctor at a salary of $500.00 per month. (R. 58.) This employment was terminated in 1943 and appellant began to practice for himself. He continued to practice through and after 1948. (Pl. Ex. 53, p. 11.)

Appellant's unreported income was computed on the net worth basis. Appellant's net assets as of October, 1936 were, by his own statement (Pl. Ex. 39), far less than $8,000. His net worth did not get to be more than $8,000 during any of the time he lived in Nebraska. (Pl. Ex. 54. See App. X App. Opening Brief.)

When appellant came to Fresno in 1942 his net assets were considerably less than $10,000. In six years, by the end of 1948, his net worth had increased to over $90,000. During that entire six year period appellant had reported a total income of less than $38,000. (Pl. Ex. 54.) After various adjustments, but without any provision for living expenses, the net worth computa-

tion demonstrated unreported income of $29,624.50 for the year 1947 and $7,842.14 for the year 1948.

The revenue agent assigned to this case spent about 2½ years investigating the affairs and assets of appellant. (R. 493.) He checked for assets at all places where appellant had resided from 1936 through 1948, checked records in recorder's offices, assessor's offices, banks, insurance companies, department stores, etc. and found no assets nor liabilities for significant dates, other than those set forth in Plaintiff's Exhibit 54. (R. 496-501.)

In attempting to account for the obvious increases in his wealth which occurred after his arrival in Fresno, appellant claimed that he had saved $300 to $400 a month from his medical practice in Nebraska (R. 761) [which he stated never produced more than $5,000 per year, gross (Pl. Ex. 53, p. 2)] and that this accumulation, plus certain moneys he claimed were given to him, were concealed in a hollow tile in the basement of his home and were brought to California. This cash hoard was said to amount to $40,000.

$12,000 of the $40,000 was claimed by appellant to have been given him by his mother just before her death, in order to equalize a gift of three houses by the mother to appellant's sister (R. 562), but appellant's aunt, called as a witness by appellant, denied that there was any such gift to equalize, because the true fact was that upon the death of appellant's mother she left five parcels of land, three to her husband, one to appellant's sister and one to appellant. (R. 603-604.)

Appellant's medical practice in Nebraska was very poor. He left Nebraska because he was not making a go of it there. His practice was so lean that he didn't pay his medical dues there because he couldn't afford to. (R. 385-388.)

The first year in which appellant reported any taxable income to the Internal Revenue Service was 1943. The records of the Internal Revenue Service show that during all the time he practiced in Wahoo, the years 1942 and before, appellant either filed no return at all or, if he filed a return, he showed no net taxable income and no tax due. (Pl. Ex. 51.)

While in Nebraska appellant made a number of small loans from the bank in Wahoo, the first in February, 1935 and the last on March 7, 1942. (Pl. Ex. 44 and 45. R. 324-326.) The amounts of these loans ranged from $70.00 to $475.00 at interest rates of 7% and 8%.

In each of the years 1936 to 1942, inclusive, appellant stated under oath to the Tax Collector at Wahoo, Nebraska, that he had no unbanked cash in his possession excepting $90.00 in 1939, $200 in 1940 and $100 in 1941. (Pl. Ex. 46.)

Appellant claimed that the small loans he had made in Nebraska were made not because he needed the money but because he thought he could establish his credit by borrowing money and promptly repaying it. He was unable to explain why, after eight years of practice, he should still be trying to establish his credit by making a $200 7% unsecured loan from the

bank at Wahoo, just two months before he left there, nor how he expected to establish his credit by paying off a loan, due in April 1939, some three months after the maturity date, in July 1939. (R. 856-859.)

On November 24, 1942, about a month after his arrival in California, appellant asked for and received an advance of salary in the amount of $200 from his employer. (R. 61.)

After a few years of practice in Fresno appellant showed a predilection for using cash rather than checks in his business transactions. On one occasion when he used a check to make a payment in connection with the purchase of property he later withdrew the check and gave cash instead. (R. 70-71.) In the construction of his home, at a cost of $43,298.62, he paid the contractor $29,273.13 in cash in various periodic payments, and the balance was paid with three checks drawn by others to appellant or his wife and endorsed over to the contractor. (R. 83-90.)

Checks received by appellant for services rendered by him to his patients (Pl. Ex. 22, 23, 24, 25 and 26) were generally not deposited (Pl. Ex. 27) in the commercial account maintained by appellant (R. 220-221), but instead, were used to make payments on appellant's bank loans (R. 247-256, 267-270), or were cashed (R. 258-263, 265), or were used to purchase cashier's checks or money orders. (R. 264-266.) He paid substantial amounts of cash to purchase savings bonds (Pl. Ex. 32) and he made very frequent visits to his safe deposit box. (Pl. Ex. 38.)

When the Internal Revenue agent attempted to examine appellant's records he was told that some of the records had been destroyed, and as to the records remaining he could look at them providing they were returned the same afternoon. (R. 504-505.)

The basic records used by appellant in computing his income from his medical practice were his patient cards and a date book or log book. Appellant kept a separate card for each patient. At the time of treatment, the date, treatment data, charge, payment, and balance owing were entered on the patient card. Charges and payments were entered daily from the patient card to the log book. With the log book there was kept a monthly total of daily receipts and an annual summary of monthly receipts. (Pl. Ex. 53, pp. 15-16; R. 875-877.) All expenses of the business were paid by check and a summary of the expenses was included in the annual summary. (Pl. Ex. 53, p. 18; Def's Ex. I & J.)

The Internal Revenue agent found several hundred patient cards, but appellant claimed to have only eight cards containing any data concerning the year 1947 and only about 30 cards concerning the year 1948. (R. 507-508.) The patient cards for years before 1949 were destroyed "because they were getting dirty". (Pl. Ex. 53, p. 19.) Log books for years 1944 to 1950 were destroyed by appellant because appellant had "a peculiar idiosyncrasy of checking back through old ledgers and worrying about patients who hadn't come back" and making himself miserable thereby. So he destroyed them to "keep myself happy." (Pl. Ex. 53,

p. 19.) Appellant burned these records some time before March of 1950. (Pl. Ex. 53, pp. 20-21; R. 891-898.) Appellant received no inheritances (Pl. Ex. 53, p. 21) and he does not know that he received any gifts, during the years 1947 or 1948. (R. 909.)

ARGUMENT.

I. THE MOTIONS FOR JUDGMENT OF ACQUITTAL WERE PROPERLY DENIED; THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT.

Appellant's Specifications of Error 1, 2, 3 and 5 are said to be covered by appellant's first argument. These specifications of error are (1) error in the denial of appellant's motion for a judgment of acquittal, (2) and (3) that the verdict is not supported by, and is contrary to the evidence and (5) that plaintiff's Exhibit No. 53, a question and answer statement given and signed by the defendant, was improperly admitted prior to the establishment of the corpus delicti.

Appellant makes no argument with respect to the fifth specification. His argument is predicated exclusively upon the proposition that the Government failed (1) to establish that there was a potential source of taxable income for the years 1947 and 1948, (2) to negate the possibility that the increase in net worth arose from nontaxable sources and (3) to show the receipt of any unreported taxable income during the years 1947 and 1948.

Appellant concedes that the evidence against him established a substantial increase (some $62,528.09) in his net worth during 1947 and 1948.

It is, of course, true that, in establishing unreported income by the net worth method, the Government has the obligation to establish that the taxpayer is in an income producing business from which income could be derived. See Balter, Fraud Under Federal Tax Law, 2nd Edition, page 426. This simply means that there be an income producing business, and not that the Government must establish specific items of reported income. *United States v. Chapman,* 168 F.2d 997, 7th Cir. 1948.

Appellant must concede that he was in an income producing business. He had engaged for a long time in the practice of medicine and even by his own figures (Appendix B, Appellant's Opening Brief), he performed services for patients for which he charged an average of $24,480 per year in 1947 and 1948. It was necessary, of course, for appellant in some way to reduce this amount to one that approached the amount of income actually reported on the tax returns. ($7,306.72 for 1947 and $10,000.58 for 1948.) To accomplish this, appellant claimed that one-third of his charges to patients were never paid. Regardless of this, it is quite clear that the appellant's medical practice produced substantial amounts of income.

It was, of course, impossible to establish any specific item of unreported income, because appellant had destroyed the only records from which could be determined what income had been reported and what income had been omitted. If it were necessary for the Government in every net worth case to show some

specific item of unreported income it "would be tantamount to holding that skillful concealment is an invincible barrier to proof." *United States v. Johnson,* 319 U.S. 503. It is exactly this type of situation that the net worth method of proof was designed to meet.

Appellant has suggested that the testimony of the witnesses who were patients of appellant establishes less income than was actually stated on the tax return. That, of course, was the case since only six patients were called as witnesses. No more could be called or located because appellant had refused to permit the Internal Revenue agents to ascertain the names of his patients, and because the records were destroyed. The agents were able to obtain the few names that were discovered only by checking records at three hospitals located in Fresno. (R. 509.) These witnesses were called, not for the purpose of establishing the extent of appellant's practice, but rather to identify certain checks which appellant had received as compensation for medical services and to show appellant's method of dealing with his receipts, that is, making payments on bank loans (R. 247-256, 267-270), or purchasing cashier's checks or money orders (R. 264-266), or receiving cash for them. (R. 258-263, 265.)

The possible source of income was adequately demonstrated, and it, along with the uncontradicted and substantial increase in net worth during the years in question, properly gives rise to the inference that the net worth increase derived from unreported income from the practice of medicine. This is particularly so

in view of the fact that appellant had destroyed all records which would show what the actual receipts from his medical practice might have been.

Appellant argues, further, that the Government did not negate all sources of nontaxable income for the years 1947 and 1948 but only showed that appellant could not account for the net worth increase by gifts or inheritances. Neither in his pre-trial statement (Pl. Ex. No. 53), nor in his testimony at the trial did appellant suggest any other possible kinds of nontaxable income as the source of his expenditures. What is more, the agent, in the course of his investigation of appellant's assets and liabilities, checked all the banks in the area where appellant resided and found no leads to any loans, assets or liabilities of appellant other than as reflected on the net worth statement for the significant dates. In *Holland v. United States,* 348 U.S. 121, 135-136, it was said that the Government must track down "relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence." That, and more, was done in this case.

Appellant himself narrowed the issue by his pre-trial statements, and by his testimony at the trial, to the contention that the expenditures made during the years 1947 and 1948 were made from some $40,000 he had saved in Wahoo, Nebraska and brought to Fresno, and which was still on hand at the beginning of 1947. The impossibility of this was adequately demonstrated by evidence showing the nature and extent of appellant's medical practice in Nebraska, by his borrowings

of small amounts of money, by his need for a salary advance shortly after arriving in Fresno, by his sworn declaration in Nebraska that he had no cash on hand, and by the fact that he filed no income tax returns indicating income sufficient to have accounted for the accumulation of the cash hoard he claimed. The situation here is exactly the same as in *Friedberg v. United States,* 348 U.S. 142, where the Supreme Court, after reciting the limited financial means of the taxpayer there during the years prior to the years charged in the indictment, (substantially the same as in this case) went on to say, (at page 144) "Yet it was during these years . . . that petitioner claimed to have accumulated 'far in excess' of $60,000. We think the jury could readily have concluded that petitioner had saved no such reserve."

The evidence clearly established the increase in appellant's net worth. The only leads supplied by appellant, in an effort to prove that the net worth increase was attributable to prior accumulations of cash, were negated by overwhelming evidence. A source of income was demonstrated, and the evidence showed that the funds expended during the years 1947 and 1948 had not been derived from nontaxable sources. The proof meets fully the requirements of the Supreme Court in the "net worth" cases recently decided. *Friedberg v. United States,* supra; *United States v. Calderon,* 348 U.S. 160; *Smith v. United States,* 348 U.S. 147, and *Holland v. United States,* supra. The Court had no alternative but to deny appellant's motions for judgment of acquittal.

II. THERE WAS NO ERROR IN THE ADMISSION INTO EVIDENCE OF PLAINTIFF'S EXHIBITS 47 AND 48.

Appellant's Specification of Error No. 4 relates to the admission into evidence of plaintiff's exhibits 47 and 48. These exhibits are photostatic copies of the joint tax returns of appellant and his wife for the years 1943 and 1944. The photostatic copies of the exhibits were used in lieu of the originals because the original tax returns had been destroyed pursuant to a directive of the Internal Revenue Service dated July 19, 1949. The photostatic copies, however, were identified by a certification which indicated a policy to preserve photostatic copies of returns where a criminal or civil investigation had not been completed at the time said returns were to have been destroyed.

Appellant now raises no question with respect to the admissibility of the tax returns themselves or even to the use of photostatic copies; this specification of error relates exclusively to the nature of the certification attached to the photostats.

Just the converse was true at the time of trial. A general objection was made to the admission of the returns, but no objection was raised as to the nature of this certification or the language of it.

The objection with respect to the 1943 return was as follows: "Mr. Colvin: The first offer in this matter, I take it, is the tax return for the year 1943, bearing the name on the first line, 'Raymond and Lucille Kasper.' To that we object on the ground that the evidence is incompetent, irrelevant and immaterial." (R. 396-397.)

And as to the 1944 tax return the objection was: "Mr. Colvin: I make the objection, incompetent, irrelevant and immaterial." (R. 397.)

The form of the certification was not mentioned by counsel for appellant, nor was any objection made to it.

Quite clearly, if there had been any such objection, it would have been a simple matter to have removed the certifications from the returns and thus from observation by the jury. Appellant's counsel saw no reason for it at the time of trial. This question cannot be raised for the first time on appeal, since it could so easily have been corrected by a timely objection, with the grounds properly stated. *Duncan v. United States,* 68 F.2d 136, 9th Cir. 1933.

Nor was there any conceivable harm to appellant by reason of the language of the certification. The very fact that the criminal trial was in progress was an indication to the jury that it had been preceded by a criminal investigation. The certification added nothing to the case from which the jury could have drawn any inferences adverse to appellant.

III. THE INSTRUCTIONS OF THE COURT REGARDING CHARACTER EVIDENCE WERE SUFFICIENT.

Appellant's Specifications of Error Numbers 6 and 12 relate to the instruction given by the Court to the effect that character evidence "is to be considered by you along with all of the other evidence in the case in

determining the guilt or innocence of the defendant," (R. Vol. 9, pp. 11-12) and in failing to give defendant's Instruction No. 46 which was as follows:

> "Relative to the testimony pertaining to the character of the defendant in respect to those traits of character which ordinarily would be involved in the commission of an offense like that charged in this case, I would instruct you as follows: Such evidence is regarded by the law as relevant to the question whether defendant is innocent or guilty of the crime charged, because the jury may, if its judgment so directs, reason that it is improbable that a person of good character in such respects would have conducted himself as alleged. Character evidence of itself may be sufficient to raise a reasonable doubt whether or not the defendant is guilty, which doubt otherwise would not exist. Hence, you must consider such evidence in connection with all other evidence in the case."

Appellant relies upon *Edgington v. United States,* 164 U.S. 361, as support for his contention that it is reversible error to fail to advise the jury that character evidence of itself may be sufficient to raise a reasonable doubt, which doubt might otherwise not exist. While it is true that substantially that language was used in the *Edgington* case, there was no suggestion that it was essential that such language be stated to the jury.

In the *Edgington* case the trial judge had instructed the jury that character evidence could be considered only if a reasonable doubt of the defendant's guilt had

been raised by the rest of the evidence. The Supreme Court held that the trial Court was in error, because evidence of good character, standing alone, might create a reasonable doubt even if the rest of the evidence created no doubt at all.

In the *Edgington* case the Supreme Court quoted with approval (at page 367) language used by the Supreme Court of Illinois in *Jupitz v. People,* 34 Ill. 516, where that Court, in holding that it was improper to limit the use of character testimony to a case where a jury had doubt of guilt and that evidence of good character was admissible in every case, went on to say "If the Court had told the jury that his good character should be taken into consideration by them, and was entitled to much weight, *a reasonable doubt of the prisoner's guilt might have been raised . . .*"

So then, it is only necessary that the evidence of good character be before the jury, so that such evidence be given the opportunity to raise a reasonable doubt. It is not necessary that this be spelled out to the jury. In commenting on the *Edgington* case, in *LeMore v. United States,* 253 Fed. 887 (5th Cir. 1918), it was said: "What the Court said . . . was said by way of argument and not to announce a rule of law to be given in the charge to the jury. We do not think the trial judge was required to charge the jury in the language quoted from the opinion." And in *Grace v. United States,* 4 F.2d 658, 662 (5th Cir. 1925), the Court said "to give the charge as drawn would unduly accentuate evidence of good character." See also *Kalmanson v. United States,* 287 Fed. 71 (2nd Cir. 1923);

Haffa v. United States, 36 F.2d 1, 5 (7th Cir. 1929); *Baugh v. United States,* 27 F.2d 257, 261 (9th Cir. 1928).

Appellant has cited *United States v. Wicoff,* 187 F.2d 886 (7th Cir. 1951). That case was almost identical with the *Edgington* case. The trial Court had instructed the jury "If there is doubt of the guilt of the defendant, character evidence may be considered." On the basis of the *Edgington* case this was held to be improper, but there was no suggestion that the language of the *Edgington* case had to be recited to the jury.

Appellant also cites *United States v. Donnelly,* 179 F.2d 227 (7th Cir. 1950). In that case the Court indicated the desirability of giving the instruction requested by appellant in this case but scrupulously avoided saying that the failure to give the instruction was error. It is quite clear that the conviction was not reversed by reason of the failure to give this instruction. The case was a very close one and a great many plain errors were involved and it was on the basis of all of them, taken together, that the Court determined that reversal was required.

The Court here fully instructed the jury on the question of reasonable doubt and made it clear to them that they must acquit if from all of the evidence, including the character testimony, they had a reasonable doubt of the guilt of the defendant. There are many elements in a tax evasion case. The Court is certainly not required to take these elements one by one, and to reiterate that a reasonable doubt of any

of them requires acquittal. A reasonable doubt may arise from one factor, or from all of the evidence. The defendant is entitled to an acquittal regardless of how it may have arisen. An instruction to the jury that if they have *any* reasonable doubt they must acquit, would seem to be sufficient. When the Court goes beyond that and advises them that in determining the guilt or innocence of the defendant they shall consider the character evidence along with all other evidence, it would seem that the rights of the defendant have been fully protected.

IV. THERE WAS NO ERROR IN THE COURT'S INSTRUCTION RESPECTING A SO-CALLED "GIFT" RECEIVED BY APPELLANT.

Appellant's Specification of Error No. 7 relates to an instruction advising the jury "if that enters into your consideration in the ultimate outcome of the case", then, with respect to a certain $2,500 payment to appellant, they should determine if it were a gift, or a payment for services.

Appellant, in an effort to account for his net worth increase, had to face the fact that he at no time had reported sufficient income to account for the growth of his assets. Accordingly it was necessary for him to characterize certain moneys that he had received in the practice of medicine as something other than taxable income. He chose to represent that various gifts had been given to him by patients. The two largest gifts claimed were one received in Wahoo, Nebraska from a man long since dead and whose identity he re-

fused to reveal to the Internal Revenue Service during the period of their investigation, and one, in Fresno, from a man who had called the doctor to repair a young woman whom the man had mutilated with a broken bottle. Despite the fact that the mutilation was criminal, appellant failed to notify the police and some time after the incident he received a "gift" of $2,500 from this individual. Appellant was unable to place the year in which this incident occurred but thought it was somewhere around the end of the war.

Apparently it could have occurred as late as 1947, but whether it did or not is not determinative. This gift was one of those gifts which appellant was attempting to use in order to account for the fact that his assets had increased although he had not reported sufficient taxable income to account for it. Accordingly, it was certainly proper for the jury to consider whether or not this truly was a gift, or whether it represented taxable income. If this supposed gift was in fact income, the jury could well doubt the nature of other "gifts."

It is to be noted that it was not the Court's instruction that brought this circumstance to the attention of the jury but rather the appellant himself. The testimony concerning appellant's action in this incident all came from appellant's pre-trial statement (Pl. Ex. No. 53) and from his testimony on the witness stand. The prejudice, if any, arose with appellant, and from evidence appellant concedes was admissible. No further harm was done appellant by the

instruction. It simply advised the jury that they could use this incident to determine the appellant's credibility when he characterized certain payments received from patients as gifts. There was no suggestion that this "gift" was contended by the Government to represent a specific item of unreported income in the tax years covered by the indictment.

What is more, the instruction served the purpose of advising the jury that they should consider this incident only for its financial aspects, and not as an indication of other improper conduct by appellant. Essentially, it was an instruction for the benefit of appellant, and one which in any event, did him no harm.

V. THE COURT'S INSTRUCTIONS ON THE "NET WORTH" METHOD OF PROOF WERE LUCID, COMPLETE AND PROPER.

A. The Instruction Given.

Appellant's Specification of Error No. 8 relates to an instruction given by the Court in which certain of the contentions of the parties were summarized. The instruction complained of is set forth at pages 8-10, Appellant's Opening Brief.

Appellant claims the instruction was prejudicial error because the trial Court advised the jury to 'resolve the truth' out of the conflicting contentions.

The part of the instruction complained of did not purport to state all of the elements of the offense, nor all of the contentions of the parties. The purpose of

the instruction was to explain to the jury the significance of the disputed cash accumulation and to advise that "in appraising and weighing the evidence in that regard, you should consider all the facts and circumstances, all the testimony and the documents disclosed in the record." (R. Vol. 9, p. 20.)

This is nothing like the instruction criticized in *Bihn v. United States,* 328 U.S. 633. There the trial Court asked the jury, in effect, "If the defendant did not steal the coupons, who did?" Of course that was improper. That was not the question. The only question was whether the defendant was guilty. But here, it was necessary that the jury 'resolve the truth' out of the respective claims of the parties as to the cash hoard. If appellant had the $40,000 he claimed, he could not be guilty, since he would have accounted for a large part of the net worth increase.

True, if he did *not* have the hoard, it did not necessarily follow that he *was* guilty. Nor did the Court indicate to the contrary in any way. It was merely stated that "the evidence as to these cash accumulations requires your appraisement." The Court was careful to point out,

> "I call your attention to this particular phase of the case, not because I am emphasizing it, but merely by way of illustration. You should apply, in my opinion, the same method of analyzing and weighing the evidence with respect to all the other evidence in the case that has anything to do with the taxable income of the defendant, in order that you may resolve the truth."

From the instructions, read as a whole, it was clear that if, in "resolving the truth" of the issues of the case, there was a reasonable doubt of guilt, there should be an acquittal, and only if there was no such doubt, there should be a conviction. The jury had no such doubt, nor does the record indicate how any such doubt could have arisen.

But, appellant contends, the instruction was erroneous in a second respect, in that it eliminated his defense that his earnings were just what he reported.

There is no merit in this contention. The Court, as was said above, made it clear that the consideration of the jury was to be directed to all of the evidence in the case, and that the particular phase of the case was called to the jury's attention "not because I am emphasizing it, but merely by way of illustration." So neither by implication nor by direction could the jury possibly have thought that they were to base their judgment solely upon this issue.

B. The Instructions Refused.

Nor was it necessary that appellant's requested Instructions 27, 30 and 43 (which form the basis of Specification of Errors Nos. 9, 10 and 11) should have been given.

Instruction No. 27 was to the effect that the jury could not assume that the net worth increase represented taxable income, but that the prosecution had the burden of proving that there was unreported taxable income in the years covered by the indictment.

This was fully covered by the instructions given, and the Court pointed out, "The mere possession of money alone is not sufficient to establish that that represents taxable income." (R. Vol. 9, p. 19.)

Instruction 30 was to the effect that the prosecution must prove, beyond a reasonable doubt, that appellant wilfully evaded taxes by understating his income, and that *"the amounts of any monies or property that the defendant received, held or expended during the calendar years in question, on which figures the prosecution's case depends, are taxable income,"* and went on to say "If the evidence in this case leaves a reasonable doubt in your mind as to whether *any difference between the reported figures, and those alleged or depended upon by the prosecution,* were the result of monies or property accumulated in prior years, or were the results of gifts, or a combination of the two," then the jury must acquit.

This instruction would have been completely inaccurate. It certainly was no part of the Government's case, nor could it have been, that all the moneys expended or properties acquired in the years 1947 and 1948 were from taxable income of those years. The Government's computations recognized that some assets had been acquired by the conversion of funds previously held, some from money borrowed, etc. The case for the Government did not depend upon proof that any specific asset derived from unreported income, but rather that the growth in assets, the net worth increase, taken as a whole, led inescapably to

the conclusion that there had been income unreported in the years of 1947 and 1948.

Requested Instruction 43 was to the effect that there could be no conviction merely because the jury thought there had been a wilful tax evasion in *some* year, but only if they were convinced, beyond a reasonable doubt, that there had been wilful evasions in the years charged in the indictment. The Court told the jury exactly that. After stating the charges against appellant in clear and simple terms (R. Vol. 9, pp. 13-14), the Court went on to charge that it was necessary that there be proved "that a tax was due and owing the United States in addition to that declared by the defendant in his income tax return and the income tax return of his wife for each of the years in question. And, further, that the defendant by so filing such a return wilfully attempted to evade and defeat the tax". (R. Vol. 9, p. 14.) And again, "The word 'attempt' contemplates that the defendant had knowledge and understanding during each of the tax years 1947 and 1948 that he had an income which was taxable and which he was required by law to report, and that he attempted to evade and defeat the tax thereon . . . by purposely failing to report all the income which he knew he had during such calendar years, and which he knew it was his duty to state in his return for such years." (R. Vol. 9, p. 15.)

The jury could not possibly have doubted that the tax evasion as to which they were required to find was the evasion during the period charged in the indictment.

Appellant suggests that these instructions "would have pinpointed for the jury, the proposition that the jury could not assume that mere proof of net worth increases in the years charged in the indictment represented taxable income in those years, but the Government had to prove that fact . . . beyond a reasonable doubt and for those specific years." (Ap. Op. Br. p. 36.) Since the Court had spelled out just exactly this, it is difficult to understand the basis for appellant's contentions here.

VI. APPELLANT SUFFERED NO HARM FROM THE FORM OF THE QUESTION ASKED OF A CHARACTER WITNESS.

Appellant's Specification of Error No. 13 relates to a question asked on cross-examination of a witness who had testified to his opinion of appellant's character. This witness was asked "Did you know or have you heard" that appellant had once been fired from a job for dishonesty.

That the question was improperly phrased is clear. The words 'did you know' should not have been included.

Appellant's claim of error is based only upon this misphrasing. He now concedes that if the question had been 'Have you heard', etc., there would have been no error. *Michelson v. United States,* 335 U.S. 469; *Stewart v. United States,* 104 F.2d 234, C.A. D.C. 1939. At the trial, the objection was not made to the form of the question, or on the ground that the question assumed a fact not in evidence (the only prope

basis for objection). The objection, instead, was on the general grounds "incompetent, irrelevant and immaterial." (R. 839.) Even when the Court overruled the objection on the ground that the Court assumed that the question "is asked in good faith by the Government"*, no further grounds of objection were stated. (R. 839.)

But even if a sufficient objection had been timely made, it is difficult to conceive how these three little words, "did you know", could have prejudiced appellant in any way. The question, if properly phrased, would have carried the same import, and sought out substantially the same information. If a proper objection had been made, the question could have been reframed, and its effect would have been just the same.

Nor is it material that the witness answered that he 'knew' appellant had been discharged. It was clear his knowledge of it could only have come secondhand, from the employer who discharged appellant (R. 838) or from appellant or elsewhere.

The inadvertent use of the three words 'Did you know' certainly does not rise to the level of misconduct by the prosecution; the Court ruled properly on the general objection made; and no harm to appellant can be demonstrated from the use of these three words. This Specification of Error is without merit.

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*The Government filed with the Court the affidavit of Government counsel, Robert H. Schnacke, to the effect that he had positive evidence that appellant had been discharged under the circumstances set forth in the question. Appellant's motion to strike this affidavit was denied. (R. Vol. 1, p. 60.)

CONCLUSION.

The evidence in this case was overwhelming. Appellant was caught in a web of false statements, misstatements and evasions. The case was fairly tried, the jury was instructed correctly, impartially and comprehensively. The verdict of the jury was the only one that could reasonably have been expected. The conviction of appellant should be affirmed.

Dated, San Francisco, California,
March 14, 1955.

Respectfully submitted,

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